United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,117

BILL STRAVAKIS AND CHRIST MITROS,
Co-administrators of the Estate of
MIKE MENAEDES, Deceased

MARIA M. MENAEDES

MARIA MENAEDES, a minor, by her
mother and next friend,
MARIA M. MENAEDES,
Appellants

v.

JOHN W. GARDNER, Secretary
Department of Health, Education,
and Welfare,
Appellee

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

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STATEMENT OF ISSUES

Appellants claim that the Government is in error in refusing to waive the collection of certain overpayments made to the decedent Mike Menaedes by the Social Security Administration. Under the applicable statutes and regulations, waiver will occur when the overpayment was made without fault on the part of the recipient, and where recovery of the overpayment would violate Title II of the Social Security Act (i.e., would deprive the recipient of the means of meeting ordinary and necessary living expenses) or would affront the principles of equity and good conscience.

The issue is this: Where overpayment is made because the recipient in faultless and reasonable reliance on an erroneous birth certificate supplies the Administration with a birth date five years too early; and where the Administration accepts the supplied date and makes Social Security payments based on that date without question until shortly before the recipient's death; and where in reliance on these payments the recipient terminates his working career though still healthy, able-bodied, and skilled in the field of restaurant operation; and where the income from Social Security payments now probably provides the necessities of life for the deceased recipient's wife and adopted daughter; can it be said that the

court below was correct in affirming the administrative decision finding that it would not violate equity and good conscience, nor would it violate Title II of the Social Security Act, for the government not to waive collection of the overpayment at this time? The case has not previously been before this Court.

STATEMENT OF THE CASE

This is an appeal from an action under Section 205(g) of the Social Security Act, 42 U.S.C.A. 405 (g). The action below was to review a final decision of the Secretary of Health, Education and Welfare, that being a decision of the Appeals Council rendered April 8, 1966, holding that there had been an overpayment of benefits to Mike Menaedes (hereinafter "decedent" or "recipient"), in that decedent had not reached age 65 at the time of his application for benefits. It was further held that decedent was without fault in creating the overpayment, as his reliance on an incorrect record of birth was reasonable. The Appeals Council also ruled that it would not violate Title II of the Social Security Act, nor would it offend equity and good conscience to collect the overpayment from the estate of the deceased recepient.

In the court below, both parties moved for summary

judgment, it being agreed that no material facts were in dispute. The government's motion was granted by Judge Holtzoff.

Jurisdiction is conferred on this Court by 28 U.S.C.A. $ 1291. Appellants argue here, as they did below, that it was error to rule as a matter of law, that the principle of waiver should not be applied on the facts existent here, which facts are as follows:

Mike Menaedes made application for old-age benefits under the Social Security Act on July 29, 1969. (Tr. 93)* He stated in his application that he had been born on April 16, 1893, and with this declaration he furnished a document issued by the President of the Municipality of Volada, Province of Karpathos, Greece (Tr. 107, 120), which satisfied the Bureau of Old Age and Survivors Insurance of the Department of Health, Education and Welfare that decedent had reached age 65. As of January, 1959 (the first month following his application in which his wages were not above the statutory limitation), he received $116.00 monthly through August, 1962. At that late date, the Administration chose to re-investigate his date of birth, but on October 9, 1962, Menaedes died. It was later

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* The references to Tr. are to the administrative record.

administratively determined that Menaedes had actually been born on July 16, 1898, and that an overpayment had been made. A Reconsideration Determination held November 7, 1963, affirmed this. (Tr. 180-183).

The Appeals Council ordered the case re-opened in 1965, and hearings before Hearing Examiner Horace H. Robbins were held on February 11 and April 4, 1966. The decision by Robbins on April 8, 1966 was consistent with the earlier rulings by the Administration on the matters regarding overpayment and the waiver of its recollection. (Tr. 5-13). In this decision, certain credits were applied to the figure claimed, thus reducing the amount claimed to be presently owing to $2305.20; the credits are not in dispute.

In the late part of his working career, decedent operated a restaurant in War, West Virginia. When he began receiving Social Security benefits, he stopped working, although according to uncontradicted testimony, he was still able-bodied and healthy and able to continue earning a livelihood in some phase of the restaurant field. (Tr. 60-61, 67).

The decedent's widow and adopted child now live in Greece, where they occupy a house owned by Mrs Menaedes.

They received $5000.00 as proceeds from a life insurance policy on Menaedes, and the widow and child each receive $81.10 monthly in Social Security survivor benefits. At the Reconsideration Determination of November 7, 1963, when the survivors' financial picture was as it is today except for the $81.10 each per month, it was found that the widow was "dependent upon Social Security benefits for the necessities of life." (Tr. 183).

SUMMARY OF ARGUMENT

The applicable statute, 42 U.S.C.A. § 404 (b) reads:

> There shall be no adjustment or recovery by the United States in any case where incorrect payment has been made to an individual who is without fault --- and where adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience (Emphasis supplied).

The Social Security Handbook restates this at Paragraph 1814:

> Relief From Making Repayment (called waiver) may be granted when:
>
> A. The overpaid person is without fault, and
>
> B. Recovery of adjustment would either:
>
> 1. Defeat the purpose of the old age, survivors, and disability insurance program; or

2. Be against equity and good conscience. The Hearing Examiner ruled that Menaedes was without fault in creating the overpayment, so if either alternative for the second prong of this test is satisfied, a decision must be rendered for appellants. Appellants argue that the purposes of Title II would be violated if no waiver occurred as, in view of the small amount of income presently going to the surviving widow and child and the high degree of uncertainty in the political picture of Greece, they stand to lack the means to provide the necessities of life if they do not take all the decedent's meager estate. Further, it cannot but be agreed that the principles of equity and good conscience would be offended if a recipient of benefits were, by reason of the overpayment, to relinquish some valuable right or change his position for the worse, and then have the government take advantage of his weakened state; in point of fact, the Social Security Regulations say that this is so. Regulation 404 - 509 App. Title 42, U.S.C.A. 20 CFR 404 - 509. Surely the decedent relinquished a valuable right when, in reliance on the government's favorable action on his application for benefits, he gave up the right to decide whether to continue working.

ARGUMENT

I. THE DECEDENT WAS WITHOUT FAULT IN CREATING THE OVERPAYMENT

An official unaltered document issued by the President of the Municipality of Volada, Province of Karpathos, Greece, indicated decedent's date of birth as April 16, 1893 (Tr. 120, Translation Tr. 107); no more credible record exists. This suggests that he was of retirement age in 1958. His reliance on this date was entirely justifiable, and the document's possible inaccuracy can by no means be viewed as the fault of the deceased.

The hearing examiner in the Reconsideration Determination of November 7, 1963, was of this opinion; he found that decedent was free of fault, and that his reliance on the Italian birth record described above was reasonable. On remand from the Appeals Council, these findings were restated; Examiner Robbins wrote:

> The Hearing Examiner will not reverse the finding stated in the reconsideration determination herein that the clamant was "without fault" in receiving the overpayment inasmuch as when he made the declaration to the Social Security Administration in his application dated July 29, 1959, the fact that he was born on April 16, 1898 (sic; should be 1893), he could reasonably have relied on the certification from the Italian record of his birth (Tr. 10).

Decedent's freedom from fault cannot successfully be assailed by an attempt to whittle it away; the hearing

examiner stated that decedent might have suspected the veracity of the 1893 birthdate himself, although his reliance on it was justifiable. The Law makes no provision for degrees of freedom from fault; one who is not responsible for the error is simply not responsible, and this was the case with the decedent here. So long as decedent's faith in the birth record was honest and reasonable, it would be highly unjust to rule that because he may have possessed some lingering doubt as to the truth of it, even though it was the best record available, his estate may now be economically decimated by the same bureaucracy, the inaction of which firmed and strengthened his reasonable reliance on it.

It remains only to determine the propriety of the Examiner's findings as to equity and good conscience and the purpose of Title II, as the finding of freedom from fault cannot be challenged successfully.

II RECOVERY OF THE OVERPAYMENT WOULD BE AGAINST EQUITY AND GOOD CONSCIENCE, IT HAVING BEEN SHOWN THAT DECEDENT RELINQUISHED A VALUABLE RIGHT AND CHANGED HIS POSITION FOR THE WORSE.

In this argument, appellants do not contend that the finding of the Examiner was incorrect, but that it was incomplete and that it overlooked critical uncontradicted evidence

supporting appellants' claim.

The Social Security Regulations §404.509, Appendix, Title 42 U.S.C.A., 20 C.F.R. 404.509, state that overpayment will be waived if collection of such payment would affront equity and good conscience, and describe such inequity in terms of relinquishment of a valuable right or alteration of one's situation for the worse in reliance upon agency action. The particular financial circumstances of any claimant are not material on this point.

Appellants contend that the decedent, upon commencing to receive Social Security benefits, materially changed his position and relinquished the valuable right to continue gainful employment. The Examiner's statement that he "cannot find that the claimant relinquished his right to remain in business in order to obtain the benefits" (Tr.11) is based on Exhibit 45 (Tr. 276), a statement by decedent that his West Virginia restaurant business was in financial difficulty. However, in order for appellants to prevail, it need not be shown that claimant relinquished any right as regards a particular place of business, but simply that he relinquished the right to <u>any</u> gainful employment. Thus the Hearing Examiner's remark does not dull the edge of testimony elicited at the February 11, 1966 hearing from Michael Menaedes, claimant's half-brother, and John Philippiades, claimant's brother-in-law, that claimant could have obtained employment in 1959 in some

phase of the restaurant business, and that his earnings would have approximated $120.00 per week. (Tr. 60-61, 67.)

There was, then, uncontroverted testimony demonstrating a relinquishment and change of position which provided for waiver of overpayment in the District of Columbia case of Green v. Secretary of Health, Education, and Welfare, 218 F. Supp. 761 (D.C.D.C. 1963).

In the Green case, it was held that it would be against equity and good conscience to require repayment of Social Security benefits by a claimant who had made a full disclosure as to her part-time employment and who received benefits without fault on her part for nearly three years until the Department determined that she had been ineligible because of part-time employment. In reference to the Regulations concerning "equity and good conscience," this court said:

> Under the language of this regulation, plaintiff "relinquished a valuable right" -- namely, the right to decide intelligently how much she wanted to work. Plaintiff stated on a questionnaire dated June 26, 1960: "I limited my earnings so that I would not earn over $1200 in any year." Had plaintiff known that the seven day rule was to be applied in a manner which would deprive her of all Social Security benefits, she might well have chosen to work much more than she did. On the other hand, she might have chosen not to work at all, and to receive instead, the insurance benefits ... Plaintiff thus lost a valuable right -- the right to choose intelligently among various alternatives -- through no fault of her own. See Kilby v. Ribicoff,

> 198 F. Supp. 184, 187 (E.D.Pa. 1961). In these undisputed circumstances, with fault attributable solely to the Department's failure promptly to follow-up plaintiff's 1956 disclosures . . . the court believes that it would be inequitable and unconscionable to require plaintiff to repay the amount she was overpaid, either by direct cash repayment or by withholding current benefits as they come due. (218 F. Supp at 764.)

The case at bar is indistinguishable in principle from the Green case. The nature of the valuable right sacrificed is the same -- a voluntary decision to work or not to work. Also, in both cases the claimant was free of fault, and the overpayment was in each instance a manifestation of bureaucratic sloth.

It is not enough for the Government to say, as it did below, that it dislikes the holding in Green, for that case was decided in this District and remains authoritative. Nor will it do for the government to say that non-waiver of the overpayment is equitable because claimant had some reason to suspect that the payments were made erroneously. It was found that the document proclaiming an 1893 birth could "reasonably have (been) relied upon," (Tr. 10) and this being so, certainly it need not develop that such reliance was 100% properly placed, on pain of severe economic detriment at some possible future date. In terminating his working career, decedent was relying in part on a belief that he was over 65, and in part on the fact that the Government with which he had dealt

openly and honestly also believed he was 65 and treated him in accordance with that belief.

The case at bar is also very similar to an example given in the Regulations illustrating the relinquishing of a valuable right. See Regulation 404.509, supra, Example 2, contained in the Addendum.

It should be restated that in urging a reversal of the administrative determination that it would not do injustice to equity and good conscience to demand refund of the over-payment, appellants are not seeking to overturn any fact fomd by the Examiner. The Examiner found that claimant relinquished his business for reasons other than reliance on government action and hence can not be found to have relinquished a valuable right. (Tr. 11.) But this finding does not relate to the only important issue, namely, whether claimant relin-quished the right to remain in any form of gainful employment in reliance on the Government's determination that he was eligible for Social Security benefits.

Appellants ask this Court to rule that uncontradicted testimony from two witnesses establishes that no matter why claimant gave up his West Virginia restaurant, he was still capable of some form of gainful employment and voluntarily chose not to pursue it, thus relinquishing a valuable right and changing his position to his detriment in reliance on

government action. Similarly, this Court should judicially notice that in 1959 anyone of claimant's background, not to mention his good health (Tr. 65-66), could have remained gainfully employed.

Had the agency questioned the decedent about his age at the time he submitted his application for benefits, and prior to awarding same, indicating to him that the proof of age submitted was insufficient, he would have been put on notice as to the possibility that his age would be disputed in the future. Then he would have been in a position to make an intelligent choice respecting pursuit of his application for benefits; acceptance of benefits awarded; and the limitation of his income to $1,200.00 in order that he might receive these benefits -- benefits which it could be said decedent knew might eventually have to be repaid if ineligibility were later determined. Had he been so alerted by the Agency it is probable that he would have chosen to seek gainful employment, during the remaining years of his life; thereby producing income equal to, if not in excess of, the Social Security benefits he received -- $116.00 per month. However, the Agency did not investigate the applicant's age thoroughly at the time benefits were initially applied for, and in fact continued to award benefits until the date of death, and because of his death he is unable to regain his former position.

Had Menaedes chosen work over retirement there would now be no question but that the meager extate being attacked would have passed freely to his wife and minor child. Clearly this is a case where the decedent was denied the right to make an intelligent choice, thus unwittingly changing his position for the worse, which fact cannot now be rectified. Hence, it would be against equity and good conscience to now hold his estate responsible for the overpayment and it should be waived.

III. RECOVERY WOULD BE CONTRARY TO THE PURPOSES OF TITLE II OF THE SOCIAL SECURITY ACT

The Hearing Examiner found as facts that (1) the plaintiff-widow received the proceeds of a $5000.00 life insurance policy, (2) that she lives in Greece in a house she owns, and (3) that she and her daughter, also a plaintiff, each receive $81.10 monthly in benefits from Social Security. On these facts, the Examiner ruled that because of the high purchasing power of the American dollar in Greece, the benefits now forthcoming will provide a continuous adequate income.

Appellants contend that this inference is erroneous. The Social Security Regulation in point, Regulation 404.508, Appendix, Title 42 U.S.C.A., 20 C.F.R. 404.508 speaks of defeating the purposes of Title II as depriving a person of income required for ordinary and necessary living expenses.

It was held in the Reconsideration Determination of November 7, 1963, that the widow was "dependent upon Social Security benefits for the necessities of life." (Tr. 183). At that time her financial situation was as it is now except for the $162.20 per month in benefits accruing to her and the child. The amount of money at issue here does not stand to brighten her situation greatly. In fact, however small are the amounts being dealt with, the realization can hardly be avoided that the money in the estate may well be the widow's and child's buffer against privation. It is all well and good to observe, as the Examiner did, the greater buying power of the dollar in Greece, but consideration must also be given to the political upheaval still reverberating throughout that country. The plaintiffs' existence, though possibly passable, is not without pecuniary need. And, the addition of the amount here in issue will certainly not elevate them to a life of luxury.

IV. IF APPELLANTS ARE CORRECT IN THEIR CONTENTION THAT THE CLAIMED OVERPAYMENT SHOULD BE WAIVED, THEN LUMP-SUM DEATH BENEFITS AND ADDITIONAL BENEFITS FOUND TO BE PAYABLE ON THE EARNINGS RECORD OF THE DECEDENT SHOULD BE JUDGMENTS AGAINST THE GOVERNMENT RATHER THAN A CREDIT AGAINST THE CLAIMED OVERPAYMENT TO DECEDENT AND WAGE EARNER.

The Hearing Examiner determined that there were certain

additional wife's and child's benefits due and payable on the earnings record of the decedent for the period August, 1961 until decedent's death in October, 1962.* The total amount of said benefits has been computed by the Social Security Administration to be $1358.00. The Hearing Examiner ruled that this amount plus the lump-sum death payment awarded to decedent's Estate on December 31, 1962, in the amount of $255.00 need not be paid by the Government, but rather that decedent's Estate be given a credit against the claimed overpayment in the amount of $5,104.00.**

Should Appellants prevail in their contention that the claimed overpayment to the decedent in the amount of $5,104.00 must be waived, then it quite obviously and logically follows that Appellants are entitled to judgment against the Government for the lump-sum death benefits and the additional wife's and child's benefits awarded by the Hearing Examiner. For, certainly, such benefits cannot be credited against an alleged overpayment which the Government is not entitled to recover.

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* This ruling was predicated upon decedents entitlement to reduced benefits based on a retirement age of 62 as provided for by the 1965 Amendment to the Social Security Act. Of course, if plaintiffs are correct in their contention that the Government is estopped to challenge that the wage earner was entitled in 1959 to Social Security benefits based on an attained age of 65 in 1958, then the judgments in favor of the wife and child should also be increased. (** Cont.)

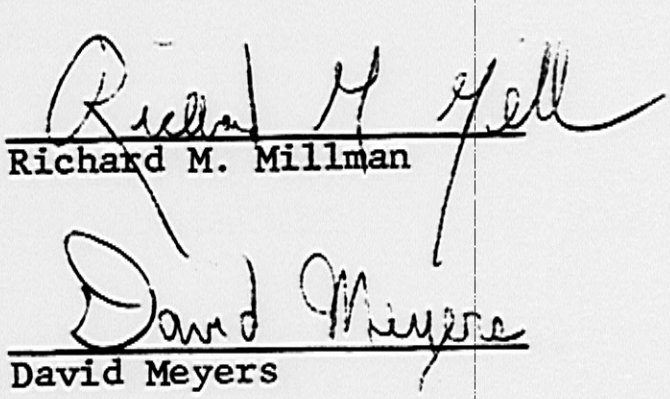
CONCLUSION

For the reasons stated herein, Appellants request that the decision of the District Court be reversed, and that this Court hold:

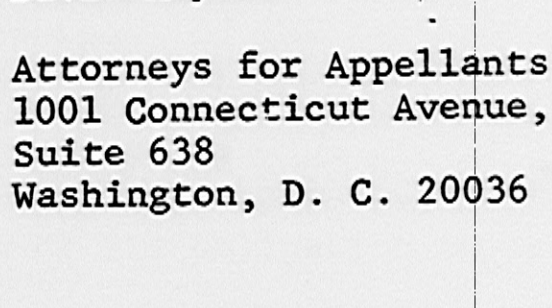
1. That there must be a waiver of collection of the overpayment to Mike Menaedes, deceased, and

2. That all moneys withheld by the Social Security Administration as a credit against this overpayment be delivered to Appellants at once.

Respectfully submitted,



Richard M. Millman



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**(From page 16) This ruling is but a further confirmation of the correctness of plaintiffs' position as set forth in Section III, supra, namely, that the decedent's estate, wife and child must be taken to be but one entity.

ADDENDUM

APPLICABLE STATUTES AND REGULATIONS

The applicable statute, 42 U.S.C.A. Section 404 (b), states in pertinent part as follows:

> "(b) There shall be no adjustment or recovery by the United States in any case where incorrect payment has been made to an individual who is without fault ... and where adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

And Paragraph 1814, page 215, of the Social Security Handbook, G.P.O. 1960, bears out the words of the above-quoted statute by stating:

> "1814. Relief from Making Repayment called waiver) may be granted when:
>
> A. The overpaid person is without fault and
> B. Recovery or adjustment would either:
> 1. Defeat the purpose of the old-age, survivors, and disability insurance program; or
> 2. Be against equity and good conscience.
>
> The effect of waiver is to relieve the overpaid person of his obligation to repay the overpayment."

Regulation 404.508 App. Title 42, U.S.C.A. 20 CFR 404.508 states:

> "'Defeat the purpose of Title II,' for purposes of this subpart, means defeat the purpose of benefits under this title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more

than ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs."

And Regulation 404.509 App. Title 42, U.S.C.A. 20 CFR 404.509 states:

"'Against equity and good conscience' means that adjustment or recovery of an overpayment will be considered inequitable if the individual (regardless of his financial circumstances) has, by reason of the overpayment relinquished a valuable right (illustrated by examples (1) and (2) below) or changed his position for the worse ...

Example 2. An individual filed for a disability insurance benefit instead of an old-age insurance benefit because he believed himself to be age 61. He relied at the time on evidence in his possession showing him to be age 61 which he had every reason to believe was correct. He was awarded and paid disability insurance benefits. Two years later other evidence was obtained which proved beyond doubt that the individual actually was age 65 when he filed for his disability insurance benefit. Consequently, the payment of disability insurance benefits was incorrect. However, because of the award of these benefits he relinquished his right to file with greater promptitude (that is, at the time he filed for disability insurance benefits) for old-age insurance benefits. Thus, recovery or adjustment of the incorrect payment for those months for which he is not entitled to old-age insurance benefits would be against equity and good conscience." (Emphasis Supplied.)

The jurisdictional statute is 28 U.S.C.A. § 1291:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

III

The pertinent West Virginia distribution statute is as follows:

> § 42-2-1. To Whom Personal Estate Distributed.
>
> When any person shall die intestate as to his personal estate or any part thereof, the surplus, after payment of funeral expenses, charges of administration and debts, shall pass and be distributed to and among the same persons, and in the same proportions, that real estate is directed to descend, except as follows:
>
> ...
>
> (b) If the intestate leave a widow and issue by the same or a former marriage, the widow shall be entitled to one-third of such surplus, and if he leave no issue, she shall be entitled to the whole thereof.

****

CERTIFICATE OF SERVICE

I hereby certify that two copies of this Appellants' brief were personally served on _____ _____, U. S. Attorney, United States Court House, Washington, D. C., this _____ day of _____, 1968.

_____
David Meyers

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,117

BILL STRAVAKIS AND CHRIST MITROS, Co-administrators of the Estate of MIKE MENAEDES, Deceased

MARIA M. MENAEDES

MARIA MENAEDES, a minor, by her mother and next friend, MARIA M. MENAEDES, APPELLANTS

v.

JOHN W. GARDNER, Secretary, Department of Health, Education, and Welfare, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
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FRANK Q. NEBEKER,
NATHAN DODELL,
JULIUS A. JOHNSON,
Assistant United States Attorneys.

C.A. No. 1799-66

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OTHER REFERENCES

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether summary judgment was properly granted below for appellee where the court, in an action under the Social Security Act, upheld the administrative decision that an overpayment of old-age insurance benefits should be recovered against the estate of a deceased wage-earner inasmuch as such recovery would not

(1) defeat the purpose of said Act by depriving his widow of necessary income, or

(2) be against equity and good conscience since the deceased could reasonably believe that he was not entitled to benefits based on his correct age, and did not relinquish a valuable right in giving up an apparently failing business in expectation of receiving benefits?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,117

BILL STRAVAKIS AND CHRIST MITROS, Co-administrators of the Estate of MIKE MENAEDES, Deceased

MARIA M. MENAEDES

MARIA MENAEDES, a minor, by her mother and next friend, MARIA M. MENAEDES, APPELLANTS

v.

JOHN W. GARDNER, Secretary, Department of Health, Education, and Welfare, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of District Court Judge Alexander Holtzoff granting appellee's motion for summary judgment in an action under section 205(g) of the Social Security Act,[1] which sought to prevent recovery of an overpayment of old-age insurance benefits from the estate of the deceased wage-earner, Mike Menaedes.[2]

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[1] Hereinafter referred to as "Act". 42 U.S.C.A. § 405(g).

[2] Hereinafter referred to as "decedent".

Proceedings and Findings of HEW

The decedent applied for old-age insurance benefits under the Act on July 29, 1959, stating in his application that he was born on April 16, 1893 (Tr. 7, 93).[3] The decedent was paid benefits of $116.00 per month from January 1959[4] through August 1962 when his benefits were suspended pending investigation of his age. A short time later, on October 9, 1962, decedent died (Tr. 7). It was determined that the decedent had not reached the requisite retirement age (65 years) when he applied for benefits inasmuch as the evidence showed he was born on July 16, 1898, rather than on April 16, 1893, as decedent claimed. Applications for benefits based on decedent's earnings record by his wife and adopted child were accordingly disallowed (Tr. 180-183).

After a requested reconsideration and hearing by an examiner, the original determination was affirmed (Tr. 180, 185). A request for a hearing on behalf of decedent's estate was subsequently made. By order dated October 13, 1965, the Appeals Council of the Social Security Administration[5] submitted this case to a second hearing examiner for resolution (Tr. 18).

Hearing Examiner Horace H. Robbins, in a decision dated April 8, 1966 made the same findings regarding decedent's correct birthdate and the amount of overpayment (Tr. 12). Benefits had been erroneously paid to him in the amount of $5,104.00, to which a lump sum death benefit of $255.00, awarded his estate on December 31, 1962, was applied to reduce the overpayment to $4,849.00 (Tr. 7-9, 12). The Examiner also determined that:

(1) recovery of the overpayment would not defeat the purpose of the Act because credits against the overpay-

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[3] "Tr." references are to pages of the certified administrative record.

[4] Benefits were awarded effective July 1958, but decedent did not start to receive them until January 1959 because his earnings were in excess of the statutory limitation until December 1958 (Tr. 7).

[5] Hereinafter called "Administration".

ments would permit decedent's estate to pass some funds on to his widow, Mrs. Menaedes, and the adopted child;

(2) recovery of the overpayment would not be against equity and good conscience;

(3) certain benefits payable on the earnings record of the decedent for the period August 1961 until his death in October 1962 should be applied to further reduce the overpayment[6] (Tr. 12-13).

On April 19, 1966 a request was made for a review of the hearing examiner's decision (Tr. 2). By letter of May 11, 1966 administrators of the estate of the decedent were informed: "The Appeals Council has decided that the decision of the hearing examiner is correct. . . Accordingly, the hearing examiner's decision stands as the final decision of the Secretary in your case" (Tr. 1).

District Court Proceedings

On July 8, 1966 a complaint was filed in District Court (C.A. 1799-66) for review of the final decision of the Secretary, and an answer thereto was filed October 28, 1966. Appellee filed a motion for summary judgment on January 17, 1968 and appellants' opposition and cross-motion for summary judgment was made March 15. On April 9 and 10, the motions were heard by Judge Holtzoff who by order of April 18 granted appellee's, and denied appellants', motion for summary judgment. Appellants noted this appeal May 10, 1968.

ARGUMENT

The District Court properly granted summary judgment for appellee.

(Tr. 7, 9-13, 15, 54, 60, 66, 67-68, 78-79, 86, 92, 94, 118, 121, 126, 140, 142, 144, 147, 149, 180, 187-189, 206-207, 209-211, 225)

The only issue raised on appeal is whether the final determination by appellee that recovery of overpayments to

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[6] Application of these benefits reduced the overpayment to the sum of $2,305.20 which constitutes the amount still due and payable to the United States from decedent's estate.

decedent either (1) "defeats the purpose" of the Social Security Act, or (2) is "against equity and good conscience", since the Act provides that when the recipient is without fault, there shall be no adjustment or recovery of overpayments in either of these instances. 42 U.S.C.A. § 404(b). We think the administrative determination that recovery should be allowed, supported as it is by substantial evidence,[7] can be sustained.

A. *Recovery of the overpayment would not defeat the purpose of the Social Security Act.*

Appellants contend that it was erroneously determined that recovery of the overpayment from the decedent's estate would not deprive decedent's widow, Maria M. Menaedes, of adequate income.[8] (Appellant's brief, p. 14). The contention has little merit.

Social Security Regulation, 20 C.F.R. 404.508, provides:

> "Defeat the purpose of Title II," for purposes of this subpart, means defeat the purpose of benefits under this title, i.e., to deprive a person of income required for ordinary and necessary living expenses. *This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs.* (Emphasis added).

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[7] As was held in *Sherrick* v. *Ribicoff*, 300 F.2d 494, 495 (7th Cir., 1962):

> The social security law expressly provides in Section 205(g) [42 U.S.C.A. § 405(g)], that the "findings of the Administrator as to any fact, if supported by substantial evidence, shall be conclusive." This finally attaches not only to the findings themselves, but also to the inferences and conclusions drawn from the facts.

Accord *Mitchell* v. *Gardner*, 123 U.S.App.D.C. 195, 198, 358 F.2d 826, 829 (1966); *May* v. *Gardner*, 362 F.2d 616, 618 (6th Cir., 1966); *Sabbagha* v. *Celebrezze*, 345 F.2d 509, 511 (4th Cir., 1965); *Thompson* v. *Social Security Board*, 81 U.S.App.D.C. 27, 154 F.2d 204 (1946); *United States* v. *LaLone*, 152 F.2d 43, 44 (9th Cir., 1945); *Walker* v. *Altmeyer*, 137 F.2d 531, 533 (2d Cir., 1943).

[8] The burden of proof in the administrative proceeding, as to the claim that recovery should be waived, was upon appellants. *Irvin* v. *Hobby*, 131 F.Supp. 851 (N.D. Iowa, 1955).

Appellee seeks to recover an overpayment of $2305.20.[9] The evidence before the Hearing Examiner showed that the decedent's widow and child were currently receiving monthly survivors insurance benefits in the amount of $162.20 [10] (Tr. 10-11). The Examiner determined that:

> On the basis of standards of living in Greece and the purchasing power of American dollars in Greece, the monthly payment of $162.20 from the Social Security Administration, which will continue for many years, furnish[es] an income to the widow and child sufficient for her ordinary and necessary needs. (Tr. 11).

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[9] The Hearing Examiner had determined that there were certain benefits payable on the earnings record of the decedent for the period August 1961 until his death in October of 1962 (these benefits resulted from application of the 1965 amendments to the Social Security Act to this case. Section 328 of Public Law 89-97, amending 42 U.S.C. § 402(j)(2). As a result, the decedent's application for benefits was treated as an application for reduced benefits payable at age 62, i.e., as of August 1961.) Similarly the application for wife's and child's benefits were deemed effective for entitlement to benefits for the period August 1961 through September 1962. (Tr. 12). These benefits were to be applied to further reduce the overpayment of $4,849.00 (the total overpayment, $5,104.00, less the lump sum death benefit originally awarded decedent's estate on December 31, 1962) as follows:

> (1) award of old age insurance benefits to the deceased, for the period August 1961 through and including September 1962 (14 months), at the rate of $84.70 per month, totalling $1,185.80.
>
> (2) award of wife's benefits to Maria M. Menaedes, for period August 1961 through and including September 1962 (14 months), at the rate of $48.50 per month, totalling $679.00.
>
> (3) award of child's benefits to Maria Menaedes, for period August 1961 through and including September 1962 (14 months), at the rate of $48.50 per month, totalling $679.00. (Tr. 12-13).

This left the sum of $2305.20 payable from decedent's estate. (The Hearing Examiner did not compute the above amounts of benefits but stated they should be credited (Tr. 12). The amounts were ascertained later by the Administration and used in the court below).

[10] This was based on $81.10 monthly in widow's benefits and the same amount monthly for the adopted child, Maria (Tr. 10), commencing from October 1962, date of decedent's death (Tr. 180).

It also appears from the record that the widow received the proceeds of a $5,000 life insurance policy, and lived in a house in Greece which she owned (Tr. 10, 78-79). Moreover, the decedent apparently left an estate of $6,500.00 (Tr. 15). Recovery of the net overpayment from this amount would leave some part of the estate intact.

Accordingly from this record there is ample support for the Examiner's conclusion that recovery of the overpayment from the estate will not deprive the widow of income required for ordinary and necessary living expenses.[11]

B. *Recovery of the overpayment would not be against equity and good conscience.*

Appellants contend that the Administration should have questioned the decedent about his age at the time he submitted his application, and before making an award, indicating to him that proof of age was insufficient. The decedent would have then been put on notice as to the possibility that his age would be disputed. Also he would have been in a position to choose between accepting benefits with an earning limitation of $1200.00 annually, or continuing to work. Appellants contend further that had the decedent been alerted by the Administration to a problem as to proof of his age, he would probably have continued to work, instead of retiring. (Appellants' brief, p. 13). We think these contentions are decidedly without merit.

The applicable regulation, 20 C.F.R. 404.509, provides:

> "Against equity and good conscience" means that adjustment or recovery of an overpayment will be considered inequitable if the individual [regardless of his financial circumstances] has, *by reason of the over-*

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[11] *Cf. Irvin* v. *Hobby*, 131 F.Supp. 851, 865 (N.D. Iowa, 1955) (determination that recovery could not be waived upheld where claimant did not make a showing that she did not have an income or financial resources sufficient for ordinary needs); *Blume* v. *Gardner*, 262 F.Supp. 405, 419 (W.D. Mich., 1966) (Claimants were members of a religious colony which assured them of at least a subsistence income: determination that recovery could not be waived was sustained.)

payment relinquished a valuable right . . . or changed his position for the worse. . . ." (Emphasis added).

"Appellants do not contend that the finding of the Examiner was incorrect," but that he failed, as we understand it, to consider the testimony of decedent's half-brother, Michael Menaedes, and brother-in-law, John Philippides, that decedent could have obtained other gainful employment in 1959. (Appellants' brief, pp. 8-10). While it appears from this testimony itself that it was decedent's intention to sell his apparently failing business and retire (Tr. 66), we think it sufficient to note that the Examiner heard all the testimony appellants desired to present and gave it such weight as he felt it deserved in accordance with his stated purpose at the beginning and conclusion of the hearing (Tr. 54, 86). What undoubtedly was of considerable weight was decedent's own statement made on August 13, 1959, two weeks after he applied for benefits, that he did not expect his self-employment income to exceed $1200 in 1959 (Tr. 11, 94). He stated:

> The mines are on strike and have been laying off men by the hundreds. My [restaurant] business has been suffering a decline for the past two years and I expect it to get worse. I have a large overhead and expenses and am barely meeting costs this year due to a decline in the volume of business. (Tr. 276).

Thus the record does not show that the decedent relinquished a valuable right to remain in business, or have other gainful employment, in order to obtain benefits.

Moreover, the Hearing Examiner considered, in deciding whether recovery would be against equity and good conscience, the decedent's "very reasonable belief that he was born in 1898", i.e., that he was not 65, as required by the Act, when he applied for benefits. As stated by the Hearing Examiner: "the claimant himself gave little credence to the 1893 birth date . . . and used that date only when he applied for old-age insurance benefits" [12] (Tr. 9). This

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[12] The only basis for the April 16, 1893 birth date decedent claimed was a Greek record, issued by the president of a municipality of Volados, Greece, which was not itself a contemporary record of

being so, the administrative decision is correct in stating that the deceased was assuming and intended to assume any risk as to the future payment of benefits (Tr. 11).

Appellants have placed sole reliance in *Green* v. *Secretary of Health, Education, and Welfare*, 218 F.Supp. 761 (D.C.D.C. 1963) to justify waiver of the overpayment in this case. Assuming *arguendo* that the result reached there by the District Court was correct, we think *Green* offers little support for appellants. In *Green*, the claimant made full disclosures when applying for benefits and was warranted, as the court found, in thinking she was entitled to them. Moreover, she deliberately limited her income so that she would not exceed $1200 in any year. Here, decedent had ample bases for thinking that he was not entitled to benefits, having not reached the requisite age. Had he even indicated uncertainty concerning his birthdate, rather than use the one he submitted on his application, as already noted,[13] an investigation then could have been made to ascertain a reliable birthdate and any anticipation of, or dependence on, unauthorized benefits would have been foreclosed. In addition, decedent unlike Green, hardly expected that his income for the year in

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birth nor based on such documentary records (Tr. 9, 118, 121, 126, 149, 206-207, 209-211, 225).

While the Hearing Examiner charitably did not reverse the finding that the decedent was "without fault," he had doubts as to his innocence, because the decedent, having good reason to know his own birth date, appeared to rely on an 1898 birth date throughout his life (Tr. 140, 188). It was noted that:

(1) decedent had declared he was born on July 16, 1898 when he applied for a social security card in 1950 (Tr. 9, 92);
(2) a voting record filed in 1950 stated his birth date as July 16, 1898 (Tr. 9, 144);
(3) a naturalization certificate, recorded on September 8, 1926 showed that he was then 28 years old, indicating an 1898 year of birth (Tr. 9, 147); and
(4) a military record made upon his discharge from the U.S. Army shows he was 43 years and 4 months old on November 30, 1942, indicating a birth date in July of 1899. (Tr. 9, 142).

(See previous Hearing Examiner's observations, Tr. 187-189).

[13] See note 12, *supra*.

which he applied for benefits would exceed $1200 [14] (Tr. 11, 276). As the Hearing Examiner concluded,

> under the circumstances of this case where the claimant had good reason to believe that he was not born at the time he stated in the application for benefits, and had good reason for retiring from his business, he was not relinquishing a right or changing his position for the worse on retiring and accepting the benefits (Tr. 7).

Indeed, the record supports the reasonable conclusion that decedent was accepting a lifeline which enabled him to have income he otherwise would not have had.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court, upholding the decision of appellee, should be affirmed.

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JULIUS A. JOHNSON,
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[14] The *possibility* of other employment is purely speculative (Tr. 60, 67-68) and we think, in view of decedent's advanced age and desire to retire (Tr. 66), remote at best.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,117

BILL STRAVAKIS and CHRIST MITROS, Co-Administrators of the Estate of Mike Menaedes, Deceased; Maria M. Menaedes; Maria Menaedes, a Minor, by her Mother and Next Friend, Maria M. Menaedes,.

Appellants

v.

JOHN W. GARDNER,
Secretary, Department of Health, Education and Welfare,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING

Appellants respectfully petition for rehearing of the decision rendered in this case on January 23, 1969.

STATEMENT

In the view of the appellants, rehearing is clearly warranted by the fact that the opinion demonstrates a misunderstanding of the principal contention advanced by the appellants.

The argument advanced by appellants was and is that Mike Menaedes relinquished a valuable right in reliance upon being granted Social Security payments from January of 1959, namely, the right to continue working, to continue earning a living in any business -- and not necessarily that he gave up his own restaurant business in West Virginia in such reliance.

With a finding that the deceased Menaedes did relinquish a valuable right in reliance on action by the Social Security Administration, his estate would be entitled to waiver of repayment of the money mistakenly paid to Menaedes in the apparently erroneous belief that he had reached age 65 at the time the payments were made. In this posture, the case would be governed by Green v. Secretary of Health, Education and Welfare, 218 F.S. 761 (D.C. D.C. 1963), cited in appellants' brief.

ARGUMENT

Believing Mike Menaedes to be 65 years of age, the Social Security Administration began paying him old-age benefits in January, 1959. The Administration decided after Menaedes death in 1962 that he was in fact five years younger than had been thought earlier, and therefore that the payments had been made in error. The government demanded a refund.

If it be assumed that the payments were erroneously made, still the government is obliged to waive any refund if the recipient is without fault and if recovery by the

government would defeat the principles of equity and good conscience or would defeat the purpose of the beneficial Social Security legislation. The use of "and" and "or" is critical, for while the recipient must in every waiver case be without fault, the statutory test is satisfied if either of the remaining propositions is fulfilled. 42 U.S.C.A. §404 (b).

Menaedes was without fault. This finding was made as early as 1963 and has been affirmed since.

To show that failure by the government to waive refund would be against equity and good conscience, appellants relied on Social Security Regulation 404-509 App. Title 42, U.S.C.A. 20 CFR 404-509. This regulation states that where one has "by reason of the overpayment relinquished a valuable right ... or changed his position for the worse," then the principles of equity and good conscience have been affronted if refund is demanded.

The valuable right relinquished here was the right to continue working. Menaedes was in good health and was experienced in the restaurant and cafe field. By uncontradicted testimony, he could have continued to bring in a decent income in the restaurant field, but in reliance on the Administration's payments to him of old-age benefits, he elected to terminate his career and retire.

The essential point which, by the express words of the opinion, eluded the Court of Appeals is that the valuable right given up by Menaedes was the right to function productively in any business, not just in the West Virginia restaurant business he had owned. Judge Danaher misconstrued the thrust of appellants' case when he wrote:

> "Appellants' principal contention is that the decedent had relinquished a valuable right, i.e., he gave up his business, in reliance upon receiving the overpayment in question, and consequently under the applicable regulation, 20 CFR § 404-509, repayment had been waived. But in deciding against the appellants on this issue, the Examiner may have given weight to the decedent's statement shortly after he had applied for benefits that his business had been suffering a decline for some two years and 'I expect it to get worse.'" Opinion of the Court, p. 2. Emphasis supplied.

Appellants' position, and that clearly contemplated by the spirit of the applicable laws, is that the status of decedent's own business is immaterial to the central question of whether he could and would have continued any form of gainful employment, had he not begun to receive old-age benefits.* On this point, appellants produced favorable and uncontradicted

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* It should be noted that Menaedes received benefits of $116.00 per month during the period in which payments were made, and that virtually any conceivable form of regular employment would have netted him more. As stated in the petition, he was able and in good health.

We ask the Court to recognize that the Social Security Administration would have found the deceased capable of

(continued on following page)

testimony which the administrative reviewing body did not apparently disbelieve, but which it simply did not consider or need to consider for the purpose of deciding whether Menaedes would have continued to work at his own eroding West Virginia diner business.

Appellants seek rehearing only of a pure question of law, believing their position to have been misunderstood at the original hearing before this Court.

CONCLUSION

For the reasons stated above, this case should be reconsidered by this Court. The ruling of the District Court should be reversed.

Respectfully submitted,

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(continued from previous page)
gainful work, in view of the stringent standards applied in Social Security disability cases. In one such case, a man had had a serious fall, after which he required a laminectomy (removal of a vertebral arch) which was unsuccessful. The man was unable to sit, lie, or stand for prolonged periods. His case was ruled as a total disability for Pennsylvania workmen's compensation purposes. He had never worked other than as a laborer, and he was unintelligent. Of nine medical reports filed, only one even indicated an ability to return to light work. Yet the Social Security Administration refused to categorize the man as one unable to engage in any substantial gainful employment. Fortunately, the District Court did not uphold the Administration.
Popovich v. Celebrezze, 220 F.S. 205 (W.D. Penna. 1963)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of this petition for rehearing were mailed postage prepaid to the U.S. Attorney's Office, U.S. Courthouse, John Marshall Place, Washington, D.C., this 7 day of February, 1969.

David Meyers